(2) Supreme Court, U.S.
FILED
04-314 SEP 2 2004
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In The
Supreme Court of the United States

October Term, 2003

UNITED STATES OF AMERICA,
Respondent,

v.

NICOLE DAVIS,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the sentence of petitioner unlawfully increased by the district judge based upon a judicial finding, by a preponderance of the evidence, of a drug amount in excess of the drug amount found by the jury at trial?

2. Was the sentence of petitioner unlawfully increased by the district judge based upon a judicial finding, by a preponderance of the evidence, of the prior convictions of the defendant?

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Report of Decision Below:

United States v. Nicole Davis and Calvin Kuykendoll, Unpublished Order (*affirming district court judgment*), No. 02-2979, 7th Cir. June 4, 2004 (attached as Appendix One); the district court judgment is unreported and was docketed on July 29, 2002, in *United States v. Nicole Davis,* 99 CR 928-1, N.D. Ill. (attached as Appendix Two).

Jurisdiction of the Supreme Court:

1. The order of the Court of Appeals for the Seventh Circuit sought to be reviewed was decided on June 4, 2004.

2. Jurisdiction to review the decision of the court of appeals in this case is conferred by 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved in the Case:

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Sentencing Guideline 2D1.1 (2001 Edition):

> Unlawful Manufacturing, Importing, Exporting, or Trafficking (including Possession with Intent to Commit These Offenses); Attempt or Conspiracy
>
> (a) Base Offense Level

(c) the offense level specified in the Drug Quantity Table set forth in subsection (c) below:

(c) Controlled Substances and Quantity	Base Offense Level
(2) • At least 10,000 KG but less than 30,000 KG of Marihuana	36
(4) • At least 1,000 KG but less than 3,000 KG of Marihuana	32

STATEMENT OF THE CASE

Petitioner Nicole Davis was indicted in the district court, along with her husband Calvin Kuykendoll, for conspiring to possess with intent to distribute, and for attempting to possess with intent to distribute, cocaine and heroin. She was tried before a jury. The trial of co-defendant Calvin Kuykendoll was severed, and took place later. The jury returned a verdict of guilty on both counts, entering on the verdict form a finding that petitioner Davis conspired to possess and did possess with intent to distribute "5 kilograms of Cocaine or more" and "1 kilogram of heroin or more." Verdict Forms attached as Exhibit 3. At sentencing on July 8, 2002, District Judge Matthew Kennelly found by a preponderance of the evidence that petitioner Davis was responsible for 67 kilograms of cocaine and one kilogram of heroin, 62 kilograms of cocaine more than the jury had found. He calculated her offense level under the Federal Sentencing Guidelines as being 36, based upon the drug amount. The judge found her criminal history category to be IV. He then sentenced her to 262 months incarceration, the low end of the applicable guideline range. Judgment attached as Exhibit 2; transcript excerpt from sentencing hearing attached as Exhibit 4. If the offense level had been based upon the amount of drugs found by the jury, it would have been level 32, which has a Sentencing Guidelines range of 168 to 210 months at criminal history category IV. The calculation is as follows. Under Sentencing Guideline 2D1.1 (2001 Edition), the district court calculated 67 kilograms of cocaine as being to equal 13,400 grams of marijuana and 1 kilogram of marijuana as equal to 1000 grams of marijuana, for a total of 14,400 grams of marijuana. This yields a base offense level of 36. No adjustments were made to that base offense level. The guideline range for level 36, criminal history category IV is 262-327 months. The judge imposed a sentence at the low end of that range. On the other hand, the jury finding of five kilograms of cocaine and one kilogram of heroin equals a total of 2000 grams of marijuana, which

yields a base offense level of 32, which, as noted above, has a Sentencing Guidelines range of 168 to 210 months at criminal history category IV. No fine or restitution were imposed.

Petitioner Davis filed a Notice of Appeal on July 17, 2002. The appeal raised only the issue of whether the government's informant, an Hispanic, selectively targeted petitioner Davis, an African-American, thereby warranting the dismissal of the indictment for selective prosecution or a downward departure in her sentence. The judgment of the district court was affirmed. Opinion of the court of appeals attached as Exhibit One.

The jurisdiction of the district court was based upon 18 U.S.C. § 3231.

ARGUMENT

The sentence of petitioner Davis was increased by at least 52 months, and more probably 94 months, based upon the finding of fact by the district judge by a preponderance of the evidence that petitioner Davis was responsible for 62 more kilograms of cocaine than the jury had found.

This Court in *Blakely v. Washington*, __ U.S. __, 124 Sup. Ct. 2531 (2004), held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), now requires that any fact that increases the sentence a judge may impose must be submitted to the jury and proved beyond a reasonable doubt. That rule is founded on the Sixth Amendment to the Constitution. The Seventh Circuit has held that *Blakely* applies to the Federal Sentencing Guidelines, and that any fact that increases the guideline range a district judge is to apply under those guidelines must be found by a jury beyond a reasonable doubt. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004). This Court has granted the government's petition for a writ of certiorari in *Booker*, as well as in the case of *United States v. Fanfan*, No. 03-47-P-H (D. Me. July 26, 2004), and oral argument is scheduled for October 4, 2004. In those cases, this Court should rule that the principles of *Blakely* do, indeed, apply to the Federal Sentencing Guidelines.

Petitioner Davis further submits that her criminal history category was unlawfully determined by the district judge based upon facts not found by the jury beyond a reasonable doubt. This Court's ruling to the contrary in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998), should be over-ruled under the principles of *Apprendi* and *Booker*.

Petitioner Davis' sentence was thus imposed in violation of the rule in *Blakely* and her rights under the Sixth Amendment. Petitioner therefore asks this Court to grant

her petition for a writ of certiorari, and to hear her case or to remand her case for re-sentencing in light of *Blakely*.

WHEREFORE petitioner Davis asks this court to grant the petition, to reverse her sentence on the grounds that it was imposed in violation of her rights under the Sixth Amendment, and to order the case remanded for re-sentencing.

Respectfully submitted,

_____

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APPENDIX ONE

ORDER OF THE SEVENTH CIRCUIT COURT OF APPEALS

100 Fed.Appx. 571, 2004 WL 1245304 (7th Cir.(Ill.))
(Cite as: 100 Fed.Appx. 571, 2004 WL 1245304 (7th Cir.(Ill.)))
<KeyCite History>
Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

Please use FIND to look at the applicable circuit court rule before citing this opinion. Seventh Circuit Rule 53. (FIND CTA7 Rule 53.)

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Nicole DAVIS and Calvin Kuykendoll,
Defendants-Appellants.

No. 02-2979, 02-4134.

Argued Feb. 11, 2004.
Decided June 4, 2004.

Background: In separate jury trials, defendants were convicted in the United States District Court for the Northern District of Illinois, Matthew F. Kennelly, J., of conspiracy to possess with intent to distribute cocaine and heroin, and attempting to possess with intent to distribute the same. Defendants appealed.

Holdings: The Court of Appeals held that:

(1) government's alleged failure to investigate and prosecute informant's non-black, similarly situated suppliers and customers did not constitute selective prosecution, and

(2) admission in defendant's trial of excerpted testimony from wife's trial pertaining to wife's address, marriage to, and cohabitation with defendant did not violate defendant's rights under the confrontation clause.

Affirmed.

West Headnotes

[1] Criminal Law k37.10(2)
110k37.10(2)

Government's alleged failure to investigate and prosecute informant's non-black, similarly situated suppliers and customers did not constitute selective prosecution; even if informant harbored racial animus toward defendants, that racial animus could not be imputed to the government and the record showed that the government did in fact prosecute one of informant's suppliers who was Hispanic and that informant testified against the supplier.

[2] Criminal Law k662.60
110k662.60

District court's admission in defendant's trial for conspiracy to possess with intent to distribute cocaine and heroin of excerpted testimony from wife's trial pertaining to wife's address, marriage to, and cohabitation with defendant did not violate defendant's rights under the confrontation clause, given that the testimony was given under oath, the wife lacked any real motivation to lie about the marriage or the address, and cross-examination by defendant would not have enhanced the veracity of the admitted statements. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 807, 28 U.S.C.A.

[3] Criminal Law k1168(2)
110k1168(2)

Even if excerpted testimony from defendant's wife's trial pertaining to wife's address, marriage to, and cohabitation with defendant was "testimonial" evidence and erroneously admitted because it was not subject to prior cross-examination by defendant, admission of such testimony was harmless given the other evidentiary grounds on which the jury could have issued its guilty verdict. U.S.C.A. Const.Amend. 6.

***572** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 99 CR 928-1, 99 CR 928-2. Matthew F. Kennelly, Judge.

Daniel Collins, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

John M. Beal, Gary W. Adair, Chicago, IL, for Defendant-Appellant.

Before EASTERBROOK, KANNE, and WILLIAMS, Circuit Judges.

ORDER

****1** Nicole Davis and her husband, Calvin Kuykendoll, were indicted by a federal grand jury for conspiracy to possess with intent to distribute cocaine and heroin. Davis was also indicted for attempting to possess with intent to distribute the same. On the first day of their joint trial, Kuykendoll moved to sever the trials and the district court granted the motion. Davis was tried first. Separate juries found both Davis and Kuykendoll guilty as charged. Davis, an African-American, appeals her conviction and sentence, alleging selective prosecution on account of her race. Kuykendoll appeals his conviction claiming that the admission of excerpts of Davis's trial testimony into evidence at his subsequent trial violated his rights under the Confronta-

tion Clause and the Federal Rules of Evidence. Davis's and Kuykendoll's appeals were consolidated. For the reasons stated below, we affirm both defendants' convictions and dismiss Davis's appeal of her sentence for lack of appellate jurisdiction.

I. BACKGROUND

Federal law enforcement officers arrested Benjamin Haro in September of 1999 for conspiracy to sell numerous kilograms of cocaine. In exchange for a reduction in his sentence, he cooperated with the government, providing the names of his suppliers and his larger customers, including Davis and Kuykendoll. Haro testified that he had met face-to-face and spoke on the telephone with both defendants and had supplied them with multiple kilograms of cocaine from February to May 1999. Haro also testified that during the course of these drug transactions, he knew Davis as "Coco" and Kuykendoll as "Derrick."

With this background, Haro, under the supervision of the Drug Enforcement Agency (DEA), arranged a drug deal with Davis. On November 22, 1999, Haro telephoned Davis's pager and a man returned the call about an hour later. Haro asked the man on the phone if he was "Coco's husband" to which he replied that he was. Speaking in code, they then discussed what kind of drugs Haro had available for sale, which included heroin and cocaine. During the conversation, the man said his wife just walked in the door. He then handed the phone to his wife, whom Haro knew was Davis. Davis then assured Haro that she would have the cash available to purchase the drugs. Four days later, Davis and Haro spoke again and Davis agreed to purchase between 40 and 50 kilograms of cocaine. On November 29, 1999, Haro spoke with Davis's husband to arrange the purchase of heroin. During the conversation, the husband handed the phone to Davis to work out the details of the deal, which included keeping the money in separate bags, as Haro told

Davis that the heroin was coming from a different supplier than that of the cocaine. Haro and Davis arranged to complete the transaction at the "Rock "n Roll" McDonald's in Chicago. That evening, Davis arrived at the appointed time in the car she had described to Haro in their phone conversation and told the undercover agent posing as Haro's cousin (whom Haro *573 had told Davis would be there to complete the deal on his behalf) that they should go somewhere else because there were people around the McDonald's parking lot. Davis was then arrested. Law enforcement recovered approximately $380,000 in cash from her car from two separate bags, one of which contained a scrap of paper inscribed with "Calvin, 250,000, June 6, 1999." Davis was charged with conspiring to purchase in excess of five kilograms of cocaine and more than one kilogram of heroin from Haro between February and June 1999, and with attempting to purchase the same controlled substances on November 29, 1999.

**2 After Davis's arrest, agents proceeded to her home in Chicago where they performed a traffic stop of a car without license plates which police observed circling the block and driving by the residence slowly. Agents discovered Kuykendoll was the driver, although he denied knowing anyone who lived at Davis's address. In a superceding indictment, the government later charged Kuykendoll with one count of violating 21 U.S.C. § 846 and Davis with two counts of violating the same.

The defendants were initially to be tried together. However, when the district court learned that Davis's defense would be antagonistic to Kuykendoll, it granted the latter's motion for severance. Davis was tried first, found guilty as charged, and sentenced to 262 months of incarceration. At Kuykendoll's trial, Haro and two government agents identified Kuykendoll as Davis's co-conspirator. When Davis refused to testify at her husband's trial, the government sought to introduce into evidence trial excerpts of Davis's

testimony from her trial which would positively identify Kuykendoll as the male voice speaking with Haro on the telephone setting up the November 29, 1999 drug transaction. The court denied the government's request. The government then sought to read in a shorter, fourteen-line excerpt of Davis's trial testimony which establishes Davis's marriage to Kuykendoll and their common residence. Those passages were allowed. The jury eventually convicted Kuykendoll as charged.

II. DAVIS

Davis argues that her equal protection rights were violated by the government's failure to investigate and charge Haro's suppliers or customers who were not African-American. Davis contends that the district court erred in rejecting her post-trial motion for a judgment of acquittal or a new trial, or, in the alternative, in refusing to depart downward in her sentence, both based on her selective prosecution claim.

[1] We review the district court's denial of Davis's post-trial motions for acquittal or a new trial for abuse of discretion. *United States v. Souffront*, 338 F.3d 809, 819 (7th Cir.2003). In reviewing a motion for a new trial, we view "the evidence in the light most favorable to the prevailing party, we draw all reasonable inferences that can be drawn from the evidence and will not set aside the jury's verdict if there is a reasonable basis in the record which supports that verdict." *Id.* While the government alleges that Davis waived her selective prosecution argument when she did not raise it before trial, *United States v. Jarrett*, 705 F.2d 198, 204-05 (7th Cir.1983), we find that "these issues have been preserved for appeal because the district court effectively 'waived' [Davis's] 'waiver' when it considered and made findings on these issues after trial." *United States v. Cyprian*, 23 F.3d 1189, 1195 (7th Cir.1994). The district court considered and rejected Davis's selective prosecution

argument for failure to make out the claim. Therefore, *574 the district court's denial of her post-trial motion for acquittal or a new trial based on a claim of selective prosecution is reviewable on appeal.

**3 To prevail on her selective prosecution claim, Davis must show that the government's prosecution had both a discriminatory purpose and effect. *United States v. Goulding*, 26 F.3d 656, 662 (7th Cir.1994). Additionally, she must overcome the presumption that the prosecution has not violated equal protection by showing "clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Davis argues that Haro's targeting of Davis and her husband, both African-American, and not Haro's white and Hispanic drug suppliers, amounted to selective prosecution attributable to the government. Assuming *arguendo* that Haro harbored racial animus towards Davis and Kuykendoll (a contention which the record does not support), that racial animus cannot, without more, be imputed to the government. Davis must affirmatively show that the racially-motivated ill will, "whoever its bearer, actually motivated [her] prosecution." *United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir.1996). Davis has made no such showing.

Similarly, Davis has made no showing of discriminatory effect. To establish a discriminatory effect in her case, she must show that similarly situated individuals of a different race were not prosecuted. *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480. Although Davis argues that the government did not investigate and prosecute Haro's non-black, similarly situated suppliers and customers, the record refutes her contention. The record shows that the government did in fact prosecute one of Haro's suppliers who is Hispanic (and that Haro testified against him). The district court, therefore, did not abuse its discretion in denying Davis's post-trial motion for a judgment of acquittal or for a new trial on the basis of Davis's selective prosecution claim.

As for Davis's appeal of the district court's decision to reject her motion for a downward departure based on her selective prosecution allegation, we are unable to review it. Davis appeals her sentence under 18 U.S.C. § 3742(a). However, this court has no jurisdiction to review a district court's decision not to depart downward unless the district court concluded erroneously that it lacked the authority to do so; in that case, we would have appellate jurisdiction to review that erroneous legal conclusion. *United States v. Bonsu*, 336 F.3d 582, 587 (7th Cir.2003). The district court judge in this case declined to depart downward not because he thought he lacked the authority to do so or similar legal error, but because he expressly found no showing of selective prosecution. The district court stated "there is no evidence in this record that would support any kind of contention that [Haro] targeted anybody or that the government targeted anybody because of their race. And so ... I'm not granting a departure on that basis." Decisions on whether or not to depart such as in this case "are left entirely to the discretion of the district court under the [Sentencing] Guidelines." *United States v. Crucean*, 241 F.3d 895, 898 (7th Cir.2001). Thus, we have no appellate jurisdiction to review the district court's refusal to depart downward.

III. KUYKENDOLL

****4** Kuykendoll makes two related arguments on appeal. He contends that the admission of an excerpt from Davis's trial testimony into evidence at his own trial violated his rights under the Confrontation Clause. He also argues the district court erred when it admitted the excerpt based ***575** on its finding that the passage fell under the residual hearsay exception in Rule 807 of the Federal Rules of Evidence. We review the trial court's evidentiary findings for abuse of discretion, *United States v. Bradley*, 145 F.3d 889, 892 (7th Cir.1998), but review de novo any district court rulings that affect Kuykendoll's Sixth Amendment right to

confront witnesses. *United States v. Castelan*, 219 F.3d 690, 694 (7th Cir.2000).

[2] We find the district court did not abuse its discretion when it admitted the excerpted testimony in Kuykendoll's trial. Rule 807, which codifies the residual hearsay exception, allows for admission of out-of court statements which display "circumstantial guarantees of trustworthiness." Fed.R.Evid. 807. The district court admitted under Rule 807 fourteen lines of Davis's trial testimony pertaining to her address, marriage to, and cohabitation with Kuykendoll.[1] The district court deemed the following characteristics of the testimony as indicators of its trustworthiness: (1) the testimony was given under oath; (2) Davis lacked any real motivation to lie about the marriage or the address; and (3) cross-examination by Kuykendoll would not have enhanced the veracity of the admitted statements. The court was well within its discretion in admitting the testimony based on these findings.[2] Because we affirm the

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[1] The excerpt from Davis's trial which the district court admitted into evidence at Kuykendoll's trial consisted of the following: "On November 16th, 1999, Nicole Davis testified in court as follows:

QUESTION:	Where do you live, Nicole?
ANSWER:	2321 North Rutherford; R-u-t-h-e-r-f-o-r-d.
QUESTION:	And that's in Chicago, Illinois?
ANSWER:	Yes, sir.
QUESTION:	With whom do you live at that address, please?
ANSWER:	I live with my husband, Calvin Kuykendoll, and my three children.
QUESTION:	Nicole, will you—you told the ladies and gentlemen of—that you are living on Rutherford with your husband and three children?
ANSWER:	Yes, sir.
QUESTION:	Were you living there in November of 1999?
ANSWER:	Yes, sir."

[2] We note that the district court rejected as unfair the more extensive testimony which the government sought to introduce (Davis identifying Kuykendoll as the male voice on the call with Haro), and instead allowed

district court's admission of the Davis excerpt under Rule 807, we need not reach Kuykendoll's alternative argument that the Davis excerpts were not admissible under Rule 804(b)(3).

[3] The district court also found that admission of the fourteen-line excerpt did not violate Kuykendoll's constitutional rights. Following the oral argument in this case, Kuykendoll and the government made a motion to cite supplemental authority-the recent Supreme Court decision, *Crawford v. Washington*, — U.S. —, 124 S.Ct. 1354, 158 L.Ed.2d 177 (U.S.2004). *Crawford* overrules *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), on which the government relied in its appellate brief. While *Crawford* holds that the Sixth Amendment bars the admission of testimonial evidence given by an unavailable witness when the defendant did not have a prior opportunity to cross-examine the testifying witness, that rule ultimately does not change the outcome of this case. The Chief Justice's remark in his concurring opinion guides us in our application of *Crawford* to the case at bar: "the mistaken application of [the Court's] new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis." — U.S. at —, 124 S.Ct. at 1378. Therefore, even if the Davis ***576** excerpt were "testimonial" evidence under *Crawford* and erroneously admitted because it was not subject to prior cross-examination by Kuykendoll, its admission was harmless as there were other evidentiary grounds (such as three testifying witnesses identifying the male voice in the call with Haro as Kuykendoll's) on which the jury could have issued its guilty verdict.[3]

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only Davis's testimony about her address, marital status, and cohabitation with Kuykendoll.

[3] We would reach the same result under the pre-*Crawford* analysis of the Confrontation Clause. Under that reasoning, evidence not falling within a "firmly rooted hearsay exception" is "presumptively unreliable." *Bradley*, 145 F.3d at 896. The evidence is therefore inadmissible absent "a

**5 We reach this harmless error conclusion under this circuit's case law as well. Harmless error analysis applies to violations of the Confrontation Clause. *Castelan*, 219 F.3d at 694. "[C]onstitutional error that is harmless will not cause an otherwise valid conviction to be set aside." *Ochoa*, 229 F.3d at 639-40. Harmless errors are those that "did not contribute to the verdict" beyond a reasonable doubt. *Id.* at 640. *See also United States v. Thompson*, 286 F.3d 950, 962 (7th Cir.2002) (same). To determine whether a constitutional error can be regarded as harmless, we look to factors such as "(1) the importance of the witnesses's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) whether other evidence corroborated or contradicted the witness's material testimony; and (4) the overall strength of the prosecution's case." *Ochoa*, 229 F.3d at 640 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Here, the government presented three witnesses who each identified the male voice on the recorded telephone conversations with Haro as that of Kuykendoll. The government also introduced into evidence Davis's and Kuykendoll's marriage certificate. Therefore, to the extent that the admitted excerpt was important to the government's case, it was cumulative.

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showing of particularized guarantees of trustworthiness." *Id.* (citing *Idaho v. Wright*, 497 U.S. 805, 817, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)). The trustworthiness of the challenged statement must be determined through an examination of the totality of the circumstances. *Id.* As Rule 807 is not a "firmly rooted" hearsay exception, *United States v. Ochoa*, 229 F.3d 631, 638 (7th Cir.2000), the district court's admission of Davis's excerpted testimony under that rule is presumptively invalid. We look therefore to the totality of the circumstances surrounding the making of the out-of-court statement to evaluate Kuykendoll's constitutional claim. Davis's testimony was given under oath in the presence of a judge. As noted by the district court, Davis lacked any real motivation to give false answers to her own attorney's preliminary questions about her marriage to Kuykendoll and their residence at a given address. Any cross-examination by Kuykendoll would not have enhanced the veracity of these statements. Taken together, these characteristics amount to "particularized guarantees of trustworthiness."

IV. CONCLUSION

For the reasons discussed above, we AFFIRM the judgments of the district court, and DISMISS Davis's appeal of her sentence for lack of appellate jurisdiction.

100 Fed.Appx. 571, 2004 WL 1245304 (7th Cir.(Ill.))

APPENDIX TWO
JUDGMENT OF THE DISTRICT COURT

AO (8/96) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA
V.
Nicole Davis

DOCKETED
JUL 29 2002

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 99CR928-1

R. Eugene Pincham
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) One and Two of superseding indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
21 U.S.C. §846	Conspiracy to distribute controlled substances	11/29/1999	One and Two

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) all remaining counts ☐ is X are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

July 8, 2002
Date of Imposition of Judgment

Signature of Judicial Officer

U. S. District Court Judge Matthew F. Kennelly
Name and Title of Judicial Officer

July 22, 2002
Date

AO 245B (3/99) Sheet 2—Imprisonment

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 262 months

X The court makes the following recommendations to the Bureau of Prisons:
that defendant be designated to FCI Greenville, IL due to the fact defendant is the mother of three young childrenwho live in Chicago.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

AO 245B (WW) Judgment in a Criminal Case
Sheet 2 — Reverse — Imprisonment

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-1

ADDITIONAL IMPRISONMENT TERMS

Sentence is to run concurrently on each of Counts 1, and 2.

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-1

ADDITIONAL SUPERVISED RELEASE TERMS

Defendant is sentenced to five years of supervised release on each of Counts 1, and 2 to run concurrently.

AO 245B (3/96) Sheet 5, Part A—Criminal Monetary Penalties

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$ Waived	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $_____

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: Nicole Davis
CASE NUMBER: 99 CR 928-1

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] In full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

APPENDIX THREE
JURY VERDICT FORMS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

FILED
NOV 30 2001
JUDGE MATTHEW F. KENNELLY
UNITED STATES DISTRICT COURT
DOCKETED
NOV 28 2001

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 99 CR 928
	)	
NICOLE DAVIS,	)	
	)	Hon. Matthew F. Kennelly

VERDICT

With respect to **COUNT ONE** of the indictment, we, the jury, find defendant NICOLE DAVIS,

GUILTY ✓ NOT GUILTY _____

If you find defendant NICOLE DAVIS guilty with respect to Count One, you then must answer the following two questions by checking the applicable line:

1. With respect to Count One, we, the jury find that the following has been proven beyond a reasonable doubt [check only one line]:

A Conspiracy to Distribute or to Possess with Intent to Distribute a measurable amount but less than 500 grams of Cocaine	_____
A Conspiracy to Distribute or to Possess with Intent to Distribute 500 grams of Cocaine or more, but less than 5 kilograms of Cocaine	_____
A Conspiracy to Distribute or to Possess with Intent to Distribute 5 kilograms of Cocaine or more	✓

2. With respect to Count One, we, the jury find that the following has been proven beyond a reasonable doubt (check only one line):

A Conspiracy to Distribute or to Possess with Intent to Distribute a measurable amount but less than 100 grams of Heroin	_____
A Conspiracy to Distribute or to Possess with Intent to Distribute 100 grams of Heroin or more, but less than 1 kilogram of Heroin	_____
A Conspiracy to Distribute or to Possess with Intent to Distribute 1 kilogram of Heroin or more	✓

With respect to COUNT TWO of the indictment, we, the jury, find defendant NICOLE DAVIS,

GUILTY ✓ NOT GUILTY _____

If you find defendant NICOLE DAVIS guilty with respect to Count Two, you then must answer the following two questions by checking the applicable line:

1. With respect to Count Two, we, the jury find that the following has been proven beyond a reasonable doubt [check only one line]:

Attempted possession with intent to distribute a measurable amount but less than 500 grams of Cocaine	_____
Attempted possession with intent to distribute 500 grams of Cocaine or more, but less than 5 kilograms of Cocaine	_____
Attempted possession with intent to distribute 5 kilograms of Cocaine or more	✓

2. With respect to Count Two, we, the jury find that the following has been proven beyond a reasonable doubt [check only one line]:

Attempted possession with intent to distribute a measurable amount but less than 100 grams of Heroin	_____
Attempted possession with intent to distribute 100 grams of Heroin or more, but less than 1 kilogram of Heroin	_____
Attempted possession with intent to distribute 1 kilogram of Heroin or more	✓

VERDICTS – COUNTS ONE and TWO

FOREPERSON

11-20-01
(Date)

APPENDIX FOUR

EXCERPTS FROM TRANSCRIPT OF SENTENCING HEARING

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 98 CR 928
	)	
v.	)	Chicago, Illinois
	)	July 8, 2002
NICOLE DAVIS,	)	1:00 p.m.
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiff: HON. PATRICK J. FITZGERALD
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Chicago, IL 60606, by
MR. WILLIAM HOOKS
MS. SHARESE L. SHIELDS

MURPHY, PETERS & DAVIS
542 South Dearborn Street
Suite 750
Chicago, IL 60605, by
MR. WILLIAM POSTL MURPHY

The previously 249 or 240 or 234 or greater than 200-kilogram deal has now become either 237 or 243 kilograms of which he's attributed, now it's 80 to 90 to Ms. Davis.

I don't think that this is sufficient to establish by a preponderance of the evidence any particular amount to Ms. Davis. I have to make a finding on an amount here. I can certainly find comfortably that there was a prior relationship, but I can't find any particular amount based on this testimony because it seems to ebb and flow with the tides, or based on his prior statements, it seems to ebb and flow with the tides.

When he's talking to the authorities in Chicago, Ms. Davis' component increases. When he's talking to the people in El Paso, it's hardly even mentioned, and I just don't think that's -- and the other thing is it's not corroborated, and so I don't think that that is sufficient to attribute any amount to either defendant, so I'm not going to do that.

So the amount of narcotics with regard to Ms. Davis is the amount that is in the presentence report, namely 50 kilos in November of '99, the 17 that she testified about from '97 to '98, and the one kilogram of heroin which converts to 14,400 kilos of marijuana, an offense level of 36.

With regard to Mr. Kuykendoll, quantity is the 50 kilograms of cocaine in November of '99 and the one kilogram of heroin. That converts, if I am doing my calculations

too severe are not arguments that I am in a position to address. Those are arguments that can only be made to the people who make the laws, whether it's the Sentencing Commission or Congress itself.

The other argument -- in other words, the other aspect of it -- is something that I can address, but it's not something that cuts in Ms. Davis' favor. I mean, the fact is, and it's not my purpose at a sentencing ever to make anybody feel worse than they already are, but the fact of the matter is, Ms. Davis, if you had been thinking of those kids, you wouldn't have been doing what you were doing here.

The evidence in this case showed that you were by any measure of the term, a significant drug dealer who literally or almost literally jumped at the chance to be involved in a drug deal, that almost overnight you were able to put together $400,000 of United States currency, and I have no -- whether or not you had gotten out of drug dealing as you testified at trial, I have no doubt that if Mr. Haro had been on the legit and had not been working for the government that you'd be back out there dealing drugs now and would have been if you had gotten those drugs from him at the McDonald's.

It's unfortunate that I have to give you the sentence that I have to give you, but the law -- it is the sentence that the law requires.

The sentence of the Court, I'm going to sentence Ms.

Davis at the low end of the guidelines because that is an adequately severe sentence, and I don't think that any further -- any higher sentence is needed for the purposes of deterrence and the other purposes that are set forth in the law.

I'm imposing a sentence of imprisonment of 262 months followed by a term of supervised release of five years. I'm waiving a fine because of the defendant's inability to pay. Special assessment of $200 is to be imposed.

During the term of supervised release, Ms. Davis will be required to comply with all of the standard conditions that have been adopted by the Court. You can't commit any kind of a crime, federal, state or local, you cannot possess a firearm or destructive device, you will have to refrain from the unlawful use of any controlled substance and will be required to pay any of the financial terms of the judgment which haven't been paid thus far.

Let me just look at one other thing here.

I'm also going -- well, I think at that point in time, given the length of time we're talking, there's really no purpose in imposing drug testing, so I'm not going to impose those.

You have the right to appeal the sentence that I have imposed in this case. If you want to appeal, you would have to file a notice of appeal with the Clerk of the Court within

Supreme Court, U.S.
FILED
SEP 14 2004
OFFICE OF THE CLERK

No. 04-314

In the Supreme Court of the United States

NICOLE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-314

NICOLE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

SEPTEMBER 2004

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* The government waives any further response to the petition unless this Court requests otherwise.